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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ROBERT STEPHENSON, Defendant and Appellant.	C063676 (Super. Ct. No. PMH2007-0017)

The defendant committed crimes of sexual violence in the early 1990's. Convicted of those crimes, he served a substantial term in state prison. Before his release, however, the district attorney filed a petition for his commitment as a sexually violent predator (SVP) under the Sexually Violent Predator Act (SVPA). (Welf. & Inst. Code § 6600 et seq.)[1] A jury found the allegations of the petition true.

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[1] Hereafter, unspecified code citations are to the Welfare and Institutions Code.

Committed as an SVP to the State Department of State Hospitals (formerly the Department of Mental Health) for an indeterminate term, the defendant appeals. He contends: (1) his commitment violated several of his constitutional rights, (2) there was insufficient evidence to support the commitment, (3) his imprisonment was unlawfully extended by holds imposed by the Board of Parole Hearings; and (4) a regulation used to impose a hold was invalid. We conclude that the defendant's contentions are without merit. Therefore, we affirm.

LEGAL BACKGROUND

" 'Sexually violent predator' means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).)

If the Department of Corrections and Rehabilitation determines that a defendant may be an SVP, it must refer the defendant to the State Department of State Hospitals for evaluation at least six months before the defendant's release date.[2] (§ 6601, subd. (a).) The State Department of State Hospitals is then required to evaluate the defendant using standardized assessment protocols to determine whether the defendant is an SVP. (§ 6601, subd. (c).) If the State Department of State Hospitals determines that a defendant is an SVP, the People may file a petition alleging that a defendant is an SVP. (§ 6601, subds. (h) & (i).) This petition must be filed while (1) the defendant is in custody serving a determinate prison term or parole revocation term or (2) while a hold is in place pursuant to section 6601.3, which allows for an additional 45 days of custody, if good cause is shown, to allow full evaluation of the defendant under the SVPA before release

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[2] As noted below, the defendant was not referred more than six months before his release date because he was not eligible to be designated an SVP at that time. He became eligible and was referred later when the law changed.

from custody. (§ 6601, subd. (a)(2).) A good-faith exception to this timing requirement, relevant to this case, states: "A petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law." (§ 6601, subd. (a)(2).)

If the People prove beyond a reasonable doubt that the defendant is an SVP, the court must commit the defendant to the State Department of State Hospitals for an indeterminate term. (§ 6604.)

Once a defendant is committed as an SVP, the State Department of State Hospitals must evaluate the defendant's mental condition at least once a year to determine whether the person remains an SVP. (§ 6605, subd. (a).) If the department determines the person is no longer an SVP, the State Department of State Hospitals must authorize the person to petition the court for unconditional discharge. (§ 6605, subd. (b).) If, on consideration of such a petition, the court finds probable cause to believe the person is no longer an SVP, the court must conduct a hearing, at which the People bear the burden of proving beyond a reasonable doubt that the defendant is still an SVP. (§ 6605, subds. (c) & (d).) If the People meet that burden, the defendant must (once again) be committed for an indeterminate term. (§ 6605, subd. (e).) If the People do not meet the burden, then the person must be discharged. (§ 6605, subd. (e).)

Another avenue for release from confinement under the SVPA is a petition under section 6608. Under this statute, a defendant committed as an SVP may petition for conditional (supervised) release or unconditional discharge without the recommendation or concurrence of the State Department of State Hospitals. (§ 6608, subds. (a) & (d).) The defendant has the burden of proof by a preponderance of the evidence. (§ 6608, subd. (i).)

FACTUAL BACKGROUND

The defendant began exposing himself in public in 1984, including exposing himself to high school students. In his words, he "got hooked on the behavior . . . , just on the adrenaline, . . . just the breaking of the law, doing the things, the shocking value of it. It . . . made [him] alive for that brief moment."

The defendant's criminal sexual behavior escalated in 1985 to assault. He entered an office complex, intending to expose himself to a woman. Finding a victim alone, the defendant knocked her to the ground and held his hand over her mouth while threatening to kill her. He intended to rape her. She pleaded with him not to rape her. The defendant ordered her to touch his partially erect penis, then he broke down and cried after assaulting her.

Also in 1985, he was standing naked next to his car near the American River bike trail. A woman approached and tried to avoid him, but he ran into her and they fell to the ground. He groped her under her tank top and tried to pull her shorts down, but she escaped by grabbing his testicles and squeezing as hard as she could.

On February 27, 1990, the defendant approached a woman at a nude beach. He threatened her with a knife and tried to penetrate her vagina with his penis. That was unsuccessful, so he forced her to orally copulate him and he ejaculated on her face.

On May 2, 1990, the defendant assaulted another woman at the same nude beach. Brandishing a knife, he chased her into the water and told her to take off her top. However, the defendant fled when other people approached. He was apprehended when he went to the nude beach a third time, six weeks after the second attack, and was recognized by the second woman he assaulted.

In 1991, the defendant was tried for the two assaults at the nude beach. He was convicted of (1) penetration by foreign object (Pen. Code, § 289, subd. (a)), (2) assault with intent to commit rape (Pen. Code, § 220), and (3) oral copulation by force or threats (Pen. Code, § 288a, subd. (c)), all with the first woman at the nude beach as the victim,

and (4) assault with intent to commit rape (Pen. Code, § 220) with the second woman at the nude beach as the victim. He was sentenced to 31 years in state prison.

The defendant has been incarcerated since these convictions.

The defendant estimated at trial on the current petition that he committed about 20 sexual offenses before he was incarcerated. In addition to exposing himself, the defendant committed other sexual offenses that were similar to the assaults for which he was convicted.

PROCEDURE

In September 2006, the Legislature amended the SVPA, which now included the defendant, because of the crimes he had committed, as a possible SVP.[3] Also in September 2006, with the defendant's expected release from prison in December 2006 approaching, the Department of Corrections and Rehabilitation referred the defendant to the State Department of State Hospitals and the Board of Parole Hearings for an SVP determination. The referral stated that the defendant's expected release date was December 29, 2006.

On December 8, 2006, the Department of Corrections and Rehabilitation "partially granted" the defendant's request, pursuant to Penal Code section 3060.7, to have his release date changed from Friday, December 29, 2006, to Wednesday, December 27, 2006. The letter partially granting the request stated: "[I]f your date remains December

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[3] To be designated an SVP under the former version of the SVPA, a defendant must have committed a sexually violent offense against two or more victims. An amendment in September 2006 added Penal Code section 220, assault with intent to commit rape, to the list of sexually violent offenses. (Stats. 2006, ch. 337. § 53, p. 2662, eff. Sept. 20, 2006.) Therefore, the defendant became eligible to be committed under the SVPA in September 2006 because he had convictions for qualifying offenses against the two women he assaulted at the nude beach. Proposition 83, passed in November 2006, amended the SVPA so that only one sexually violent offense was required. (§ 6600, subd. (a)(1).)

29, 2006 your date will be adjusted. You were informed that as release dates are subject to change your date would not be adjusted until your Parole Audit is done. At that time, if your date remained the same, your file would be referred to the C&PR for contact with the Parole Unit."[4]

On December 21, 2006, the Board of Parole Hearings, at the State Department of State Hospitals' request, ordered a three-working-day hold in order to complete the SVP evaluation. (15 Cal. Code Regs., § 2600.1, subd. (a).) The form imposing the hold stated that the defendant's release date was December 27, 2006. The third working day after Wednesday, December 27, 2006, was Tuesday, January 2, 2007, as a result of the weekend and the New Year's Day holiday. However, if the defendant's release date was still Friday, December 29, 2006, the third working day after that release date was Thursday, January 4, 2007. It appears that the proper release date was December 29, 2006, because there is no evidence in the record that the conditions for moving the release date to December 27, 2006, were fulfilled.[5]

On December 29, 2006, the State Department of State Hospitals formally requested the Board of Parole Hearings to conduct a probable cause hearing for the purpose of placing a 45-day hold on the defendant.

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[4] The defendant provides no citation to the record showing that the conditions for changing his release date to December 27, 2006, were fulfilled.

[5] The district attorney made this argument in the trial court (that the three-day hold began on Dec. 29, 2006), and it appears the trial court accepted it because it determined that there was no problem with the timing of the Board of Parole Hearings' proceedings. The Board of Parole Hearings, itself, had found that the timelines had been met. However, the Attorney General fails to notice the issue and, instead, accepts the defendant's assertion that the three-day hold ended on December 29, 2006.

On January 3, 2007, the Board of Parole Hearings held a hearing to determine whether probable cause justified a 45-day hold pursuant to section 6601.3.[6] It granted the 45-day hold, which was to remain in effect from December 29, 2006, to February 12, 2007.

On February 13, 2007, the State Department of State Hospitals received evaluations supporting the defendant's commitment as an SVP. On the same day, the District Attorney filed a petition for commitment, alleging that the defendant is an SVP. The petition stated that the defendant was, at that time, subject to a 45-day hold pursuant to section 6601.3, which allows the Board of Parole Hearings to hold a defendant up to 45 days after his scheduled release for evaluation as an SVP.[7] The petition sought an immediate finding that it supported probable cause, on its face, and that the defendant should be detained until a hearing was held to determine whether he is an SVP.

Also on the same day, February 13, 2007, the trial court made findings that (1) the defendant was scheduled to be released that day (Feb. 13, 2007) and (2) the petition, on its face, supported a finding of probable cause. It therefore ordered the defendant detained pending a probable cause hearing on February 22, 2007, which was later changed to February 21, 2007, on the defendant's motion. (§ 6601.5.)

On February 20, 2007, the defendant filed a petition for writ of habeas corpus and motion to dismiss. He alleged that the 45-day hold, pursuant to section 6601.3, had expired on February 12, one day before (1) the People filed the petition for commitment

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[6] In the defendant's brief, he claims that he objected to the Board of Parole Hearings' hearing on the basis that the Board of Parole Hearings "had lost jurisdiction as of December 29 and that no statutory authority justified a further 45 day hold." The defendant's citations to the record, however, do not support his assertion that he made these objections at the hearing.

[7] The statute refers to the Board of Prison Terms. As of July 1, 2005, however, that board was abolished and replaced by the Board of Parole Hearings. (Pen. Code, § 5075.)

and (2) the trial court made the finding that the petition showed probable cause on its face. The defendant argued that, because the 45-day hold expired before the petition was filed and the trial court ordered the defendant held on the petition, the petition was untimely and his incarceration unlawful.[8]

At a hearing on the petition for writ of habeas corpus and motion to dismiss, the People argued that, because February 12, 2007, was a court holiday, the People had until February 13 to file the petition and obtain the order holding the defendant. The People also argued that, even if the petition were late, the good-faith-mistake-of-law-or-fact exception in section 6601, subdivision (a)(2) applied, thus preventing dismissal. The trial court denied the petition for writ of habeas corpus and motion to dismiss on the timeliness issue and found probable cause, based on psychological evaluations, to hold the defendant for trial on the petition.

On May 22, 2007, and again on February 21, 2008, the defendant filed petitions for writ of habeas corpus and motions to dismiss. He asserted, among other things, that the 45-day hold and a prior three-day hold placed on him in December 2006 were unlawful.[9] The trial court denied the petitions and motions. The court held that alleged

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[8] In the petition for writ of habeas corpus and motion to dismiss filed on February 20, 2007, the defendant argued: (1) his detention on February 13, 2007, was unlawful because the 45-day hold expired February 12, 2007; (2) the petition for commitment was false and misleading because it stated that the 45-day hold did not expire until April 14, 2007 (a clerical error); and (3) the petition for commitment was insufficient to support a hearing because the qualifications of the doctors whose opinions supported the petition were not disclosed.

[9] In the petition for writ of habeas corpus and motion to dismiss filed on May 22, 2007, the defendant argued: (1) the three-day hold expired December 29, 2006, so the Board of Parole Hearings had no jurisdiction to hold the probable cause hearing on January 3, 2007; (2) there was insufficient evidence to support probable cause because (a) the defendant did not commit the predicate offenses and (b) the evidence relied on by the hearing officer was inadmissible; (3) the defendant's custody beyond February 12, 2007, was not the result of a good faith mistake of fact or law; (4) the district attorney

defects in the hearing by the Board of Parole Hearings to impose the 45-day hold were not a basis for dismissal of the petition for commitment. The court also held that the filing of the petition to commit the defendant under the SVPA one day after he was scheduled for release was a result of a good faith mistake of law -- the belief that Code of Civil Procedure section 12a extended the filing deadline by one day because of the holiday.[10]

A jury found the allegations of the petition for commitment true, and the trial court committed the defendant as an SVP for an indeterminate term.

DISCUSSION

I

Waiver of Constitutional Challenges

On appeal, the defendant raises several constitutional challenges to his commitment. His constitutional challenges are that: (1) the use of the SVPA's good-faith exception to timely filing of a petition violated his equal protection rights because no such exception applies to mentally disordered offenders (MDO's), (2) his indeterminate commitment violated his equal protection rights because MDO's are not

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was not authorized to file the petition for commitment because he had not received, reviewed, and concurred with the doctors' evaluations; (5) the petition did not contain sufficient evidence to support a probable cause finding because the full psychological evaluations were not attached; and (6) the petition was "unconstitutionally deficient" because (a) it stated incorrectly that the defendant's 45-day hold expired on April 14, 2007, and (b) the documents supporting the petition were not certified.

In the petition for writ of habeas corpus and motion to dismiss filed on February 21, 2008, the defendant argued that new authority established that Code of Civil Procedure 12a does not extend a 45-day hold to the next court day when the last day of the hold is a holiday. (See *People v. Superior Court* (*Small*) (2008) 159 Cal.App.4th 301 (*Small*).)

10 The defendant sought writ relief in this court and the Supreme Court, but the petitions were denied summarily. (*In re William Stephenson* (C057332, C059032) and (S159054, S165509).)

subjected to the same commitment, (3) the SVPA violates his due process rights because, once committed, he has the burden of proving he should no longer be detained, (4) the SVPA violates his due process rights also because the standard for commitment -- that is, a person who is "likely" to engage in sexually violent criminal behavior -- is not narrowly tailored to a compelling state interest, and (5) the SVPA violates the ex post facto clause.

The defendant did not raise any constitutional challenges to his commitment until the day he filed his notice of appeal from the commitment order. He claims that this tardy assertion of constitutional claims preserved the issues for appeal. We disagree.[11]

The defendant's further assertion that trial counsel was ineffective for allowing forfeiture of the constitutional claims is without merit because the defendant fails to establish prejudice.

Background on Forfeiture Issue

The SVPA provides for the involuntary civil commitment, for treatment and confinement, of an individual who is found, by a unanimous jury verdict (§ 6603, subds. (e) & (f)), and beyond a reasonable doubt, to be a "sexually violent predator" (§ 6604).

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11 In response to the defendant's argument that he did not forfeit his constitutional claims, the Attorney General meekly states: "In responding to appellant's equal protection, due process, and ex post facto claims, respondent has not argued that appellant waived or forfeited those claims. [Citation.] Accordingly, respondent offers no affirmative response to appellant's arguments with respect to waiver and/or forfeiture." We have no way to know whether this is a concession or simply an abnegation of the Attorney General's responsibility to represent the People of California.

The Attorney General's position on this issue is reminiscent of the defense in a case prosecuted by Daniel Webster. During his closing argument Webster said of the defense: "The counsel neither take the ground, nor abandon it. They neither fly, nor light. They hover." (Webster, *The Murder of Captain Joseph White* in The Great Speeches & Orations of Daniel Webster with an Essay on Daniel Webster as a Master of English Style (Whipple edit., 1889) p. 199.)

In any event, the Attorney General's hovering does not prevent us from deciding this issue.

Before 2006, a sexually violent predator was committed to the custody of the Department of Mental Health (now called the State Department of State Hospitals) for a two-year term. The SVP's term of commitment could be extended for additional two-year periods. (Former § 6604, as amended by Stats. 2000, ch. 420, § 3, pp. 3139-3140; former § 6604.1, as amended by Stats. 2000, ch. 420, § 4, p. 3140.) On September 20, 2006, the Governor signed into law Senate Bill No. 1128 (2005-2006 Reg. Sess.), which amended the SVPA effective immediately. (Stats. 2006, ch. 337, § 62, p. 2668.) Among other changes, the amended SVPA provides for an indeterminate term of commitment. (Stats. 2006, ch. 337, § 55.) Voters later approved Proposition 83, amending the SVPA effective November 8, 2006. Like Senate Bill No. 1128, Proposition 83 provided that an SVP's commitment is "indeterminate." (§ 6604; *People v. Whaley* (2008) 160 Cal.App.4th 779, 785-787.)

Proposition 83 also changed the law concerning release of an SVP. If the State Department of State Hospitals determines that a person is no longer an SVP, the person may petition the court for release. (§ 6605, subd. (b).) If the state opposes the petition, it bears the burden of proving beyond a reasonable doubt that the person is still an SVP. (§ 6605, subd. (d).) If the State Department of State Hospitals does not determine the person is no longer an SVP, the person may still file a petition for release, but the person bears the burden of proving by a preponderance of the evidence that he is not an SVP. (§ 6608, subds. (a) & (i).)

In *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*), a defendant committed to the State Department of State Hospitals for an indeterminate period pursuant to the SVPA challenged his indeterminate commitment on equal protection, due process, and ex post facto grounds. The court rejected the defendant's due process and ex post facto

arguments, thus upholding the SVPA with respect to those constitutional provisions.[12] (*Id*. at pp. 1191-1195.) On the issue of equal protection, however, the Supreme Court reversed and remanded for further proceedings. (*Id*. at pp. 1208-1211.)

The remand proceedings in *McKee I* are now final. (See *People v. McKee* (2012) 207 Cal.App.4th 1325, review den. Oct. 10, 2012, S204503 (*McKee II*).) In *McKee II*, the Fourth Appellate District affirmed the trial court's determination upon remand that the People had met their burden under the equal protection clause to justify treating SVP's differently from MDO's and persons committed after being found not guilty by reason of insanity (NGI's). (*Id*. at pp. 1347-1348.)

Procedure Relevant to Forfeiture

The matter of the defendant's commitment under the SVPA was tried to a jury, which found the petition true on November 19, 2009. The court imposed the commitment for an indeterminate period, pursuant to the SVPA, on December 1, 2009. On December 8, 2009, the defendant filed his notice of appeal from the commitment order. Also on that day, he raised, for the first time, the constitutional claims he makes on appeal, filing what his counsel called a "respondent's legal brief regarding commitment." The new filing asserted that the SVPA violates constitutional due process, equal protection, ex post facto, double jeopardy, and petition rights. The trial court set the legal brief for a hearing on January 21, 2010.

On December 11, 2010, three days after his counsel filed the notice of appeal and the new legal brief, the defendant, himself, sent a letter to the court asking why he was still in jail and had not yet been sent to Coalinga State Hospital. He asked: "What in the world is the hold up? And what must be done to speed the process along?" As a

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12 The defendant here acknowledges that the *McKee I* court rejected the due process and ex post facto arguments against the SVPA. He raises them on appeal, however, in an attempt to preserve those issues for federal review.

postscript to his letter, the defendant added: "I understand that my attorney has a motion hearing on 1-21-10. If this is effecting [*sic*] my transfer then, and regardless, I officially waive my right to be present at the hearing on the above referenced date. Hopefully this will help [smiley face]."

At the hearing on January 21, 2010, defense counsel (the defendant was not present) stated that he filed the brief merely to "perfect the record" because he had not raised the constitutional claims earlier. The court stated that it had received and reviewed the legal brief and ordered that the "Indeterminate Term of Commitment will stand." The defendant did not file a new notice of appeal.

Law on Forfeiture of Constitutional Claims

"[T]he California Supreme Court has consistently applied waiver or forfeiture rules in the context of fundamental constitutional rights. [Citations.] The reason for these rules has been articulated by the California Supreme Court as follows: ' "An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial." ' [Citation.] The California Supreme Court has held: ' "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . ." ' [Citation.] Further the California Supreme Court has held: ' " 'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" [Citation.]' [Citation.]

"The California Supreme Court has not only required specific objections in connection with the assertion of constitutional rights, but assignments of error must be made promptly. There are well established and consistently applied California Supreme Court holdings requiring prompt and timely objections in connection with a whole host of constitutional and statutory issues. [Citations.] Delay in raising constitutional and statutory issues can constitute waiver, forfeiture, and procedural default of a defendant's constitutional and statutory claims." (*In re Jermaine B.* (1999) 69 Cal.App.4th 634, 645-646, original italics.)

Analysis

The defendant makes no attempt to argue that his raising of constitutional claims in the trial court was timely. Instead, he argues that his claims are cognizable on appeal for various other reasons. Indeed, the constitutional claims are not timely. Neither were they validly raised at all in the trial court. The trial court had no jurisdiction to consider the constitutional claims because the notice of appeal had been filed. (*People v. Wagner* (2009) 45 Cal.4th 1039, 1061.)

Therefore, we consider the defendant's three assertions claiming his failure to timely assert the constitutional claims should be excused: (1) no waiver of constitutional rights may be implied but must be express, (2) the sentence was unauthorized, and (3) the authority for the contention postdates the conduct complained of. None of these assertions has merit.

First, the proposition that constitutional claims can be waived or forfeited only expressly is plainly wrong. As noted above, a constitutional right may be forfeited by failure to assert it. (*In re Jermaine B.*, *supra*, 69 Cal.App.4th at pp. 645-646.)

Second, although an unauthorized sentence may be challenged on appeal even in the absence of a trial court objection, that principle does not apply here because there was no unauthorized sentence. This argument applies only to the defendant's assertion that the indeterminate commitment was unconstitutional.

Sentencing issues not raised in the trial court may nonetheless be addressed on appeal if the sentence imposed was unauthorized. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]" (*Ibid*.)

Here, the defendant claims the sentence was unauthorized because the statute upon which the sentence is based is unconstitutional. This is a claim concerning the validity of the statute, not whether the sentence is authorized. It is clearly authorized by the statute, which is not unconstitutional. (*McKee II, supra,* 207 Cal.App.4th at pp. 1347-1348.)

In any event, allowing an appellant to challenge a sentence on appeal as unauthorized by claiming the statute is unconstitutional would eradicate the forfeiture rule as to appellate constitutional challenges to sentences. That is inconsistent with the forfeiture rule. Only those constitutional challenges that are "pure question[s] of law" are excepted from the forfeiture rule. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889.) The question of whether the indeterminate commitment violates equal protection is not a pure question of law, as shown by the Supreme Court's remand of *McKee I* for development of the facts.

Third and finally, the defendant cannot claim that the authority for his assertions of constitutional error postdated the conduct complained of because, although the California Supreme Court decided *McKee I*, which we discuss below, after the trial court here issued the commitment order, the authority for the defendant's contentions are the United States and California Constitutions. Furthermore, the California Supreme Court had made it clear, even before the commitment order in this case, that it was considering

the constitutional issues the defendant now seeks to raise. The court had granted review on those issues both in *McKee I* and a case from this district.[13]

The defendant's constitutional challenges against the SVPA are therefore forfeited.

Effective Assistance of Counsel

The defendant claims that, if we conclude he forfeited his constitutional claims by failing to assert them in a timely fashion in the trial court, his right to effective assistance of counsel was violated. We disagree because he has failed to establish prejudice.

"To succeed in a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that, but for counsel's error, the outcome of the proceeding, to a reasonable probability, would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, the claim on appeal must be rejected unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)" (*People v. Lawley* (2002) 27 Cal.4th 102, 133, fn. 9.)

It is not necessary for the court to examine the performance prong of the test before examining whether the defendant suffered prejudice as a result of counsel's alleged deficiencies. (*Strickland v. Washington, supra*, 466 U.S. at p. 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Ibid.*)

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13 *People v. Riffey* (C055649), review granted August 8, 2008, transferred back to Third Appellate District May 20, 2010, with directions to vacate its decision and suspend proceedings until proceedings on the *McKee I* remand are final. (S164711.)

We consider prejudice as to each of the constitutional issues he raises on appeal: (1) equal protection as to the SVPA's good-faith exception to timely filing of a petition, (2) equal protection as to his indeterminate commitment, (3) due process rights as to his burden of proving he should no longer be detained, (4) due process rights as to the use of the word "likely" to describe an SVP, and (5) ex post facto.

(1) *Equal protection -- good-faith exception.* The defendant's equal protection challenge focuses on the difference between laws concerning SVP's and MDO's. Specifically, with respect to an SVP, "A petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law." (§ 6601, subd. (a)(2).) There is no similar good-faith exception to the laws concerning MDO petitions.

As to whether the good-faith exception applicable to SVP's violates the equal protection clause because there is no such good-faith exception for MDO's, the contention fails because the differences between SVP's and MDO's justify the differential treatment. (*McKee II, supra*, 207 Cal.App.4th at pp. 1347-1348.)

(2) *Equal protection -- indeterminate commitment.* On the indeterminate commitment issue, the defendant has not shown prejudice because he has not shown that, absent a trial court objection, his commitment would have been reversed on equal protection grounds. In fact, in his briefing on appeal, he does not seek reversal of his commitment on equal protection grounds. Instead, he states that "until further direction from the state Supreme Court is received, [] his case should be remanded to the trial court to determine whether sufficient justification has been shown for treating SVP's differently from MDO's and NGI's under the guidance provided in *McKee* [*I*]." This is not an argument for reversal of the commitment; it is an argument for more proceedings. Therefore, he has not shown prejudice on the equal protection issue, regardless of whether his counsel should have raised the issue in the trial court.

(3) *Due process -- burden of proof.* As defendant concedes, his due process challenge to the SVPA based on an indeterminate commitment and alleged procedural defects in the SVPA fails in this court because *McKee I*, *supra*, 47 Cal.4th at pages 1192 to 1193, rejected it. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

(4) *Due process -- "likely" standard.* Under the SVPA, an SVP is a person who, among other elements, is "likely" to "engage in sexually violent criminal behavior." (§ 6600, subd. (a).) Noting that "likely" in the SVPA does not mean " 'more likely than not,' " as held in *People v. Roberge* (2003) 29 Cal.4th 979, 986, and *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 922, the defendant asserts that the "likely" standard violates due process rights because it is not narrowly tailored to the state's compelling interest of keeping SVP's off the streets. He argues: "Because California's SVP law permits the state to confine several individuals who would not otherwise offend for each individual who otherwise would, it is not narrowly tailored and denies due process of law."

We disagree that the "likely" standard is not narrowly tailored to the compelling state interest of protecting the public from SVP's. Public protection can require that we keep off the street a person with what experts discern is less than a 50-50 chance of reoffending. As stated by the Supreme Court, the "likely" standard means "a *substantial danger*, that is, a *serious and well-founded risk*, of committing such crimes if released from custody." (*People v. Roberge*, *supra*, 29 Cal.4th at p. 988, original italics, fn. omitted.) The standard is applied to each defendant, without regard to whether other defendants are likely to reoffend, and determines whether the risk to the public is high enough to justify commitment. This standard is narrowly tailored to the state's compelling interest.

To the extent that the defendant's argument is that the California Supreme Court cases concerning the "likely" standard are wrong, the argument fails in this court because

we are bound by the higher court cases. (*Auto Equity Sales, Inc.* v. *Superior Court, supra,* 57 Cal.2d at p. 455.)

(5) *Ex post facto*. As defendant concedes, his ex post facto challenge to the SVPA fails in this court because *McKee I, supra*, 47 Cal.4th at pages 1193 to 1194, rejected it. (*Auto Equity Sales, Inc.* v. *Superior Court, supra,* 57 Cal.2d at p. 455.)

Because the defendant suffered no prejudice from trial counsel's alleged deficiency in raising constitutional issues, the claim of ineffective assistance of counsel fails.

II

Sufficiency of Evidence

The defendant contends that no substantial evidence supports his commitment. We disagree.

To be committed under the SVPA, there must be expert psychological evidence, using standardized assessment protocols, that the defendant "is likely to engage in acts of sexual violence without appropriate treatment and custody." (§ 6601, subds. (c) & (d).) "While there is no need for proof of a recent overt act while the offender is in custody (Welf & Inst. Code, § 6600, subd. (d)), it is clear that the SVPA permits civil commitment only upon a finding that the person has *current* psychological symptoms that render him or her likely to reoffend." (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1219, original italics.)

When a defendant challenges the sufficiency of the evidence in proceedings under the SVPA, "this court must review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.] To be substantial, the evidence must be ' "of ponderable legal significance . . . reasonable in nature, credible and of solid value." ' [Citation.]" (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466.) "In reviewing the record to determine the sufficiency of the evidence this court may not redetermine the credibility of witnesses, nor reweigh

any of the evidence, and must draw all reasonable inferences, and resolve all conflicts, in favor of the judgment. [Citation.]" (*People v. Poe* (1999) 74 Cal.App.4th 826, 830.) In particular, we may not reassess the credibility of experts or reweigh the relative strength of their conclusions. (*Id*. at p. 831.) We reverse only if no rational trier of fact could have found the essential elements beyond a reasonable doubt. (*People v. Rowland* (1992) 4 Cal.4th 238, 269.)

In this case, the evidence supporting the defendant's commitment consists, for the most part, of his convictions and the expert opinion of Dr. Garrett Essres, a clinical psychologist who works as an independent contractor for the State Department of State Hospitals. Dr. Essres conducted two evaluations of the defendant, one in 2007 and one less than six months before the defendant's trial in 2009.

Dr. Essres explained that during evaluation interviews subjects are inclined not to self-report their fantasies and urges. He found the defendant to be untruthful in several respects during the interview, attempting to appear better at the interview than the record of his accomplishments supported. When asked to recount his history of sex offenses, the defendant did not include all of his sex offense convictions and he tried to minimize some of them, claiming he was not guilty. He did, however, admit that he felt compelled to expose himself, even though it made him feel sick. He also admitted that he had exposed himself on 20 to 25 occasions when he was not caught.

As a result of his review of the defendant's records and his evaluations of the defendant, Dr. Essres diagnosed the defendant as having three disorders: (1) Paraphilia, which is a general category for sexual disorders. This states generally that the defendant has a sexual disorder, which is not otherwise specified. The defendant's commission of a series of nonconsensual sexual acts over a period of more than six months led to this diagnosis. (2) Exhibitionism. This diagnosis requires urges, fantasies, or behaviors over a period of more than six months that would lead to exhibition. And (3) cocaine

dependency. As to this diagnosis, the defendant is in early full remission because of his controlled environment.

In making his diagnosis, Dr. Essres was aware of several factors: (1) the defendant's convictions for sexual offenses, (2) the defendant's admissions that he had committed many other offenses for which he was not convicted, (3) the defendant's pattern of escalating offenses, going from exhibitionism to hands-on offenses, (4) the defendant's sexual offenses against strangers, (5) the defendant's continuing sexual offenses even after having received treatment in the 1980's while on probation, and (6) the defendant's statements that he had been compelled to commit the offenses despite being disgusted by the conduct.

Dr. Essres also evaluated the defendant for the risk of reoffending, using professionally accepted methods including the Static-99 test. That Static-99 test addresses risk of reoffending for sex offenders specifically. As a result of that testing, Dr. Essres concluded that the defendant was a high risk for reoffending. With a score of eight on the Static-99 test, the defendant has a 45-percent chance of committing a new offense that will result in conviction within five years and a 52-percent chance of the same within 10 years. The chance that he will reoffend (whether convicted of the offense or not) is much higher than his chance that he will reoffend and be convicted as a result.[14]

The fact that the defendant has not committed a sexual offense against a prison staff member during his years of custody does not weigh in favor of reduced risk once he is released under the Static-99 test.

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[14] Under a later iteration of the Static test, Static-2002, the defendant's chance of reoffending resulting in a conviction would have been somewhat lower: 32.9 percent in five years and 40.8 percent in 10 years. But, regardless of which test is used, the defendant is a high risk.

The defendant contends that this evidence is insufficient to support his commitment because the evidence of his mental disorders was not sufficiently objective and recent. To the contrary, Dr. Essres evaluated the defendant's behavior less than six month before trial. The psychological testing, including the Static-99 test, evaluated the defendant's current mental disorders and current risk of reoffending.

Citing *People v. Buffington* (1999) 74 Cal.App.4th 1149 (*Buffington*), the defendant asserts that opinion evidence alone cannot support a finding of a mental disorder. *Buffington* stated that the SVPA "requires 'recent objective indicia of the defendant's condition' and a 'recent objective basis for a finding that an inmate is likely to reoffend.' " (*Id*. at p. 1161; see also *People v. Hubbart, supra*, 88 Cal.App.4th at p. 1219 [SVPA requires "a finding that the person has *current* psychological symptoms that render him or her likely to reoffend," original italics].) However, contrary to the defendant's suggestion, the *Buffington* court did not hold or suggest that expert opinion cannot provide substantial evidence that a person is an SVP.

In *Buffington*, the court addressed several constitutional challenges to the then current version of the SVPA, including an argument that the SVPA violated equal protection because it had less stringent evidentiary requirements than other civil commitment schemes. (*Buffington, supra,* 74 Cal.App.4th at pp. 1153-1164.) Specifically, the defendant argued that the SVPA, in contrast to other schemes, did not require " 'any recent objective indicia of the defendant's condition' or 'any recent objective basis for a finding that an inmate is likely to reoffend.' " (*Id.* at pp. 1159-1160.) After reviewing the administrative and judicial proceedings required under the SVPA to determine whether a person qualifies as an SVP (including whether he has a diagnosed mental disorder that makes him likely to reoffend), the court rejected this contention. (*Id.* at pp. 1160-1161.) The court, quoting the appellant's argument, concluded that the SVPA *does* require " 'recent objective indicia of the defendant's condition' and a 'recent objective basis for a finding that an inmate is likely

to reoffend,' " and that " 'current psychological symptoms are needed' to establish that a person is an SVP. [Citations.]" (*Id.* at p. 1161.) In stating these conclusions, the court did not state or suggest that expert testimony was disfavored or could not constitute substantial evidence under the SVPA. To the contrary, in upholding the SVPA, the court emphasized the importance of the statute's requirement of professional assessments (by mental health professionals) of various diagnoses and specified risk factors. (*Id.* at pp. 1160-1161.)

Here, Dr. Essres's opinion concerning the defendant's diagnoses was specific and supported by the facts. This objective evidence was sufficient to support the commitment.

The defendant further contends that the evidence was insufficient to support the commitment because it was based mainly on his convictions and he has not reoffended while in prison. The contention is without merit because Dr. Essres based his diagnoses on the defendant's current mental disorder based on his evaluation of the defendant. While Dr. Essres took into account the defendant's convictions, he also observed the defendant and, from the complete picture, made his diagnoses. Furthermore, evidence that the defendant has not reoffended in prison is not very helpful. (See *People v. Sumahit* (2005) 128 Cal.App.4th 347, 353 [absence of assault of staff merely shows behavior in controlled setting].)

In his reply brief, the defendant asserts that the statistics on his likelihood of reoffending related only to his exhibitionism, which is not a sexually violent crime. To the contrary, Dr. Essres noted the defendant's pattern of escalating offenses, going from exhibitionism to hands-on offenses. The evaluation of the defendant's risk of reoffending was not limited to his earlier exhibitionism.

The evidence was sufficient to support the commitment.

III

Detention Past Parole Release Date

The defendant challenges the timeliness of the petition filed against him alleging he is an SVP. He claims the petition was untimely because there was no justification for placing on him (A) a three-day hold and (B) a 45-day hold. We disagree.

At the time of the events relevant to this appeal, section 2600.1 of title 15 of the California Code of Regulations provided the Board of Parole Hearings with the authority to extend a defendant's incarceration "where exceptional circumstances preclude an earlier evaluation and judicial determination of probable cause (Welfare & Institutions Code section 6602) prior to return to custody or release on parole." (15 Cal. Code Regs., former § 2600.1, subd. (a).)

The operative provision stated: "Upon notification from the Department of Corrections [and Rehabilitation], [State] Department of [State Hospitals], or Board of [Parole Hearings] staff that there is some evidence to believe that an inmate or parolee in revoked status is a sexually violent predator within the meaning of Welfare and Institutions Code division 6, part 2, chapter 2, article 4, (section 6600 et seq.), the board may order imposition of a temporary hold on the inmate or parolee in revoked status for up to three (3) working days pending a probable cause hearing by the board. The temporary hold period may be extended for a reasonable period of time to retain counsel or an interpreter, if needed, for the inmate or parolee in revoked status. Attempts to retain counsel or other assistance resulting in lengthening the temporary hold time shall be documented." (15 Cal. Code Regs., former § 2600.1, subd. (b).)

In addition to this regulation allowing a three-day hold, the Welfare and Institutions Code provided for a 45-day hold, as follows: "Upon a showing of good cause, the Board of [Parole Hearings] may order that a person referred to the State Department of [State Hospitals] pursuant to subdivision (b) of Section 6601 remain in custody for no more than 45 days beyond the person's scheduled release date for full

evaluation pursuant to subdivisions (c) to (i), inclusive, of Section 6601."[15] (Former § 6601.3; Stats. 2000, ch. 41, § 1, p. 129.)

As noted above, the Welfare and Institutions Code provides for a good-faith exception to the time limits for filing a petition for commitment as an SVP: "A petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law." (§ 6601, subd. (a)(2).)

A. *Three-day Hold*

The defendant argues that the three-day hold, pursuant to section 2600.1 of title 15 of the California Code of Regulations was unlawful because there were no exceptional circumstances justifying the hold and the probable cause hearing was not held during the three-day hold. We conclude that (1) the circumstances sufficiently supported the decision to impose the three-day hold and (2) the three-day hold extended to January 4, 2007, and (3) even assuming there were some error by the Board of Parole Hearings, such error was the result of a good faith mistake of fact or law. Accordingly, the arguments are without merit.

1. Circumstances Supporting Three-Day Hold

The regulation in effect at the relevant time allowed the Board of Parole Hearings to impose a three-day hold on the defendant pending a probable cause hearing. (15 Cal. Code Regs., former § 2600.1, subd. (b).) The purpose for the regulation was "to provide a mechanism for screening . . . inmates under the Sexually Violent Predator Program . . .

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[15] Section 6601.3 was later amended to add subdivision (b), which provides: "For purposes of this section, good cause means circumstances where there is a recalculation of credits or a restoration of denied or lost credits, a resentencing by a court, the receipt of the prisoner into custody, or equivalent exigent circumstances which result in there being less than 45 days prior to the person's scheduled release date for the full evaluation described in subdivisions (c) to (i), inclusive, of Section 6601." (Stats. 2010, ch. 710, § 5.)

where exceptional circumstances preclude an earlier evaluation and judicial determination of probable cause . . . prior to . . . release on parole." (15 Cal. Code Regs., former § 2600.1, subd. (a).)

The defendant asserts there were no exceptional circumstances justifying the three-day hold. We disagree.

The amendment to the Welfare and Institutions Code that made the defendant eligible to be deemed an SVP was passed in September 2006, just three months before the defendant's expected release. Under the SVPA, a defendant is screened by two mental health professionals. If they agree that the defendant meets the criteria as an SVP, the State Department of State Hospitals may request the district attorney to file a petition for commitment. (§ 6601, subds. (d).) If one disagrees, however, the State Department of State Hospitals must arrange for two independent mental health professional to evaluate the defendant. (§ 6601, subds. (e).) If the two independent mental health professionals agree that the defendant meets the criteria as an SVP, a petition for commitment may be filed. (§ 6601, subds. (f).)

On December 14, 2006, Dr. Douglas Korpi evaluated the defendant and concluded that he did not meet the criteria as an SVP. With the defendant's expected release approaching, the Board of Parole Hearings, on December 21, 2006, ordered a three-day hold beyond the defendant's release date for the State Department of State Hospitals to complete the evaluations. On December 26, 2006, Dr. John Hupka evaluated the defendant and found that he met the criteria as an SVP. Thereafter, the Board of Parole Hearings held the hearing that resulted in the 45-day hold.

These circumstances justified the three-day hold. The law had been recently changed. The defendant's convictions newly qualified him for SVP consideration. The first mental health professional determined that the defendant did not meet the criteria as an SVP, and the second mental health professional disagreed. Further evaluations were necessary. Therefore, the three-day hold was properly imposed.

2. Three-day Hold Period

The Board of Parole Hearings imposed the three-day hold on December 21, 2006. At that point, the defendant's release date was December 29, 2006. Therefore, the hold was in place until January 4, 2007, because it extended the release date by three working days, and the Board's probable cause hearing concerning whether to impose the 45-day hold was held on January 3, 2007. Using these calculations, the probable cause hearing was held within the three-day hold period.

We disagree with the defendant's assertion that his release date was December 27, 2006, and that the three-day period expired on December 29, 2006. As noted above, there is no indication in the record that the conditions for moving the defendant's release date to December 27, 2006, had been fulfilled.

To the extent that the defendant asserts that the three-day hold ended on December 29, 2006, because the Board of Parole Hearings' order made his 45-day hold retroactive to that date, the assertion is without merit. It appears that the Board applied the 45 days to the end of the defendant's prison term, without regard to the three-day hold that had been imposed to allow time for the Board to act. In other words, even though a three-day hold had been imposed, the defendant's 45-day hold began at his original release date.[16]

3. Good Faith Mistake of Fact or Law

In any event, section 6601, subdivision (a)(2) provides for a good-faith exception to SVP procedure timing problems. It states: "A petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law." (§ 6601, subd. (a)(2).) Here, there is no indication that, assuming there were timing problems with the three-day hold, they were the result of bad faith.

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[16] The Attorney General overlooks or fails to recognize these problems with the defendant's arguments.

B. *45-day Hold*

The defendant challenges two aspects of the 45-day hold, which extended from December 29, 2006, to February 12, 2007. He contends that (1) the 45-day hold was unlawful because there were no exceptional circumstances for continuing to hold the defendant and there was no probable cause shown at the hearing and (2) the 45-day hold had expired before the district attorney filed the commitment petition. The contentions are without merit.

1. Lawfulness of 45-day Hold

The 45-day hold was imposed because two mental health professionals had evaluated the defendant and disagreed concerning whether the defendant met the SVP criteria. The hold allowed the State Department of State Hospitals to obtain evaluations from two independent mental health professionals as required by the Welfare and Institutions Code. Therefore, the hold was justified.

Furthermore, there was probable cause to impose the 45-day hold. The defendant's convictions qualified him for SVP status, and one mental health professional had concluded that he met the criteria as an SVP. These circumstances were sufficient to support a finding of probable cause that the defendant was an SVP.

2. Expiration of the 45-day Hold

A 45-day hold is not extended to the next day when it falls on a weekend or holiday. (*Small, supra,* 159 Cal.App.4th 301.) Therefore, the filing of the petition for commitment was one day late. Nevertheless, the trial court determined that the good-faith exception applied to this timing problem.

At the hearing on one of the petitions for writ of habeas corpus and motions to dismiss, the district attorney explained that the State Department of State Hospitals had calculated that the petition for commitment could be filed on February 13, 2007, even though the 45-day hold would expire on February 12, 2007, because the 12th was a

holiday. The district attorney received the information on February 13, 2007, and filed the petition that day.

Small was decided on January 24, 2008, and held that Code of Civil Procedure section 12a, which extends the last day for performance of any act to the next day that is not a holiday, does not apply to the expiration of a 45-day hold. (159 Cal.App.4th at p. 310.) Therefore, because the trial court had found no good cause for failure to file a timely petition, the *Small* court affirmed the trial court's dismissal of the petition. (*Ibid*.)

Here, the trial court expressly found that the late filing of the petition "was the result of a good faith mistake of fact or law." (§ 6601, subd. (a)(2).) In that way, this case is distinguishable because there was no such finding in *Small*.

The trial court did not abuse its discretion in determining that the good-faith exception applied. Nothing in the record contradicts the finding of the trial court that the mistake was made in good faith.

IV

Validity of Regulation

For the first time on appeal, the defendant contends that the three-day hold pursuant to section 2600.1 of title 15 of the California Code of Regulations was illegal because the regulation conflicts with the statute, which provides only for a 45-day hold. (§ 6601.3.) The defendant complains that the regulation allows for a total 48-day hold. We need not reach the question of whether the regulation conflicts with the statute because, even if it does, the defendant suffered no prejudice as a result. The defendant was held for a total of 45 days after his release date (which was Dec. 29, 2006), plus the one day based on the mistake of law (excused under the good-faith exception), not for 48 days past his release date. The Board of Parole Hearings made his 45-day hold retroactive to the original release date. Accordingly, because he was not prejudiced, he cannot complain. (Cal. Const., art. VI, § 13.)

DISPOSITION

The order of commitment is affirmed.

NICHOLSON, Acting P. J.

We concur:

ROBIE, J.

DUARTE, J.